No. 181

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE F. W. FITCH COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

620165—44——1

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OPINIONS BELOW

The opinion of the District Court (R. 15) is reported at 52 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 34) is reported at 141 F. (2d) 380.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 29, 1944. (R. 38.) The petition for a writ of certiorari was filed on June 21, 1944, and was granted on October 9, 1944. (R. 40.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 619 (a) of the Revenue Act of 1932 and Section 3441 (a) of the Internal Revenue Code require that a manufacturer's advertising and selling expenses be excluded from its selling prices in computing the excise tax imposed by Section 603 of the Revenue Act of 1932 and Section 3401 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

These are set forth in Appendix A, *infra*, pp. 21–26.

STATEMENT

During the period from October 1, 1936, to June 30, 1939, the petitioner was subject to the excise tax imposed upon manufacturers of toilet articles. In computing its tax for this period the petitioner determined selling prices without excluding therefrom any amount of its advertising and selling expenses. (R. 26.) The petitioner subsequently filed a claim for refund of a portion of the tax paid on articles sold by it, on the ground that the selling and advertising expenses attributable to those articles should have been excluded from the selling prices in computing the tax. (R. 24, 25.) Neither in its claim for refund nor at any other stage in the case has the petitioner asserted that any sale was at retail. The claim for refund was rejected, and the petitioner filed suit against the United States in the District Court, which held after trial (R. 15) that such expenses

should have been excluded, and that the petitioner was therefore entitled to a refund of $59,718.88 for taxes paid and not passed on. Judgment was entered accordingly (R. 28), but on appeal the Circuit Court of Appeals for the Eighth Circuit held that the exclusion was erroneous and reversed the judgment of the District Court (R. 34–38).

SUMMARY OF ARGUMENT

Section 603 of the Revenue Act of 1932 imposed on toilet preparations sold by the manufacturer or producer an excise tax equivalent to stated percentages "of the price for which so sold." Section 619 provided for computing the amount of the sales price of a number of articles subject to excise taxes under various sections of Title IV of the Revenue Act of 1932, including Section 603. Section 619 (a) provided that, in computing the sales price, there should be included "any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment," but that "the amount of tax imposed by this title, whether or not stated as a separate charge," and a "transportation, delivery, insurance, installation, or other charge (not required * * * to be included)" should be excluded.

The petitioner, a manufacturer and seller of taxable toilet goods, contends that under this provision there must be excluded from its selling prices the amounts of its advertising and selling

expenses attributable to the taxable articles. We submit that this provision was intended only to provide definite rules for ascertaining the manufacturer's actual f. o. b. price for the taxable articles, and that it permits exclusion only of "charges" for transportation, delivery, insurance, installation or other items similar in nature, insofar as they are not incident to placing the article in condition packed ready for shipment. The expenses here in question are of a wholly different character, and indeed are not "charges" at all unless that term is to be read as embracing every item of expense that contributes to the commercial value of the taxable article. That the expenses in question are not excludable is shown by the language of Section 619 (a), its legislative history, its consistent administrative construction, and its relation to other provisions of the statute.

ARGUMENT

THE PETITIONER'S ADVERTISING AND SELLING EXPENSES WERE NOT EXCLUDABLE FROM ITS SELLING PRICES IN COMPUTING THE TAX IMPOSED BY SECTION 603 OF THE REVENUE ACT OF 1932 AND SECTION 3401 OF THE INTERNAL REVENUE CODE

Section 603 of the Revenue Act of 1932[1] (Appendix A, *infra*) imposed on toilet preparations

[1] The tax imposed by Section 603 on toothpaste and similar articles was terminated as of June 30, 1938, by Section 701 of the Revenue Act of 1938, c. 289, 52 Stat. 447. The remaining provisions of Section 603 were subsequently embodied in Section 3401 of the Internal Revenue Code (26

sold by the manufacturer or producer an excise tax equivalent to stated percentages "of the price for which so sold." The petitioner contends that this provision is qualified by Section 619 (a)[2] (Appendix A, *infra*), in that there must be excluded from the prices for which the petitioner sold taxable articles, the amounts of its selling and advertising expenses allocable to those articles. This contention was sustained by the Circuit Court of Appeals for the Seventh Circuit in the two cases of *Campana Corp.* v. *Harrison,* 114 F. 2d 400, 135 F. 2d 334. It has been rejected, however, by the Circuit Court of Appeals for the Second Circuit in *Bourjois, Inc.* v. *McGowan,* 85 F. 2d 510, certiorari denied, 300 U. S. 682, and by the Court of Claims in *Ayer Co.* v. *United States,* 38 F. Supp. 284. See also *Inecto, Inc.* v. *Higgins,* 21 F. Supp. 418 (S. D. N. Y.); *Luzier's Inc.* v. *Nee,* 24 F. Supp. 608, 611 (W. D. Mo.), affirmed on another ground, 106 F. 2d 130 (C. C. A. 8th), certiorari denied, 309 U. S. 660. We believe that these latter decisions are correct, and that the petitioner has wholly failed to sustain its burden of establishing the existence of a statutory right to the claimed exclusion. Cf. *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593; *Helvering* v.

U. S. C., Sec. 3401). Section 3401 of the Internal Revenue Code was prospectively amended by Section 3 of the Revenue Act of 1939. (Appendix A, *infra.*)

[2] This became Section 3441 (a) of the Internal Revenue Code.

Amer. Dental Co., 318 U. S. 322, 329–330; *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49; *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440.

Section 619 (a) of the Revenue Act of 1932, upon which the petitioner places sole reliance, provides for the ascertainment of the "sales price" as follows:

> In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

The gist of this provision is that the measure of the tax shall be the manufacturer's f. o. b. price at the place of shipment. All of the specified "charges" relate to the ascertainment of the amount of that price, and are of such character that they are often billed as separate charges.

Section 619 (a) clearly reflects the experience gained in the administration of provisions, like the general provision of Section 603 of the Revenue Act of 1932, which had been contained in

earlier Revenue Acts.[3] It had been uniformly ruled, apparently without notable dispute, that no selling expenses of the manufacturer were excludable from its selling price in computing the tax imposed by these earlier statutes.[4] There had arisen, however, troublesome questions whether amounts received by the manufacturer on sales of taxable articles should be adjusted with respect to amounts separately charged by the manufacturer or included in its selling price for containers, for necessary packing for shipment, for the excise tax itself, or for the the cost of shipment from the manufacturer to the customer. In general, the Commissioner allowed exclusion of these items of expense only if the charges had been separately stated in good faith by the manufacturer.[5] In *Lask's Products Co.* v. *United States*,

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[3] Section 600 (a) (b) (e) (f) (g) (h) (i) (j) of the Revenue Act of 1917, c. 63, 40 Stat. 300; Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057; Sections 900, 904 of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 600 of the Revenue Act of 1926, c. 27, 44 Stat. 9.

[4] Article III of Treasury Regulations 44 (1918 ed.); Article 4 of Treasury Regulations 47 (1919, 1921, 1924, 1926 editions). The same construction was placed upon the 1932 Act in an administrative ruling made shortly after its enactment. S. T. 678, XII-I Cum. Bull. 415 (1933), Appendix A, *infra*, p. 26.

[5] Article III of Treasury Regulations 44, fn. 4; Article 3 of Treasury Regulations 47; L. O. 1096, I-I Cum. Bull. 437 (1922); S. T. 415, II-I Cum. Bull. 285 (1923); cf. *Anheuser Busch Assn.* v. *United States*, 207 U. S. 556, 563; *United States* v. *Wood*, 85 Fed. 212 (C. C. E. D. Va.); *Karthaus* v. *Frick*, Fed. Case No. 7,615 (C. C. D. Md.).

278 U. S. 175, this Court indicated that, at least as an original matter, even the amount of tax separately stated should be included in the selling price in computing the tax, since "the amount added because of the tax is paid to get the goods and for nothing else." (278 U. S. at 176.) Cf. *Shearer* v. *Commissioner*, 48 F. 2d 552, 554–555 (C. C. A. 2d); *Hall-Scott Motor Car Co.* v. *United States*, 3 F. Supp. 818 (C. Cls.).

Section 619 (a) was worded and intended to deal only with the borderline questions of items of expense incurred by the manufacturer in the course of completing sales of taxable articles after the article itself had been manufactured. These matters apart, the tax was imposed on the actual selling price of the manufacturer. Article 8 of Treasury Regulations 46, promulgated under the Revenue Act of 1932 (Appendix A, *infra*). The petitioner's assertion (Br. 18) that Congress meant to draw a line between "manufacturing and non-manufacturing costs" and to exclude from the manufacturer's selling price all but the former is in direct conflict not only with the plain words of the statute but also with the construction made in Lash's case, *supra*. If Congress had intended the creation of the broad and vague categories suggested by the petitioner, it would hardly have expressed that purpose by the detailed specifications of excludable and not-excludable charges found in the statute.

Advertising and selling expenses of the manufacturer are not "other charges" as that term is employed in Section 619 (a). That term embraces only expenses similar in character to those of transportation, delivery, insurance and installation. This view is required by the familiar rule of *ejusdem generis,* by the consistent administrative construction of the Act (G. C. M. 21114, 1939–1 Cum. Bull. 351, 353), and by the statements with reference to its meaning found in the committee reports on the bill which became the Revenue Act of 1932.[6] The parenthetical matter following this phrase and the designation of other

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[6] H. Rep. No. 708, 72d Cong. 1st Sess., p. 37 (1939–1 Cum. Bull. (Part 2) 457, 483) stated—

"Section 604 provides rules for determining the sale price which is the basis of the tax. In general, this should be the manufacturer's or producer's price at the factory or place of production. This means that charges for coverings and containers and charges incident to preparing the article for shipment or delivery should be included, while transportation, delivery, insurance, and *like charges* should be excluded." [Italics supplied.]

As reported by the Senate Finance Committee, the provisions of Section 604 of the Bill as passed by the House were included as Section 606 (a) of the Bill, and amended to specify that it was immaterial whether the charges were separately stated. S. Rep. No. 665, Part 3, 72d Cong., 1st Sess., p. 3, contains the following explanation by Senator Walsh (a member of the Senate Finance Committee) of the provision which eventually was adopted by the Senate:

"SEC. 604. SALE PRICE

"This gives rules for determining sales price in specific cases.

"(a) The general rule. It provides for the inclusion of

excludable charges in no way militates against this view, since it serves simply to provide that, to the extent that the provisions for inclusion and exclusion may overlap, the former shall control. Thus, a transportation charge incident to putting the taxable article in condition for shipment would be included in the selling price. Article 12 of Treasury Regulations 46, promulgated under the Revenue Act of 1932 (Appendix A, *infra*); G. C. M. 21114, *supra*. The sole function of the provision for exclusion of "other charges" was, therefore, to exclude from the selling price such miscellaneous expenses as those of warehousing, telegrams, etc., incurred in the process of getting the taxable articles to the customer.

Obviously, however, expenses of the character sought to be excluded in the present case are in no way comparable to charges for delivery, in-

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all charges incident to placing the article in condition for shipment and for the exclusion of transportation, delivery, and *similar charges*." [Italics supplied.]

The provision was enacted as Section 619 (a) of the Act in the form recommended by the Senate Finance Committee. The Conference Committe Report (H. Conference Rep. No. 1492, 72d Cong., 1st Sess., p. 22 (1939-1 Cum. Bull. (Part 2), 539, 548) states—

"Amendment No. 183: This amendment eliminates the provisions of the House bill relating to determination of the tax in the cases of sales at retail and sales at less than fair market price and provides (1) a method of determining sale price by including charges for containers and the like and excluding the tax under Title IV and transportation, delivery, and *similar charges* • • • The House recedes." [Italics supplied.]

surance, or installation. Indeed, they do not constitute "charges" of any nature unless that term is to be construed to include every item of expense that contributes to the commercial value of the taxable article. The petitioner concedes (Br. 23, 25–26) that the very purpose and effect of expenses of the kind here involved is to build up a consumer demand which adds to the commercial value of the taxable articles. These expenses were as much a part of the production of the distinctive Fitch products involved (R. 26) as the costs of materials and labor which went into their production. Since the tax in question is not a tax on profits but an excise tax measured by the selling price of the articles, it is wholly immaterial that, as the petitioner points out (Br. 23–24), the manufacturer may not in all cases increase its profits by incurring these expenses.

Elsewhere in the Act Congress specified and made particular provision for cases where it deemed the manufacturer's business methods to be of such character as to require special treatment in order to prevent discriminatory application of the tax.[7] It provided in Section 619 (b) (Appendix A, *infra*) that where the manufacturer sold at retail, or otherwise than through a transaction at arm's length, the tax should be based on a figure determined by the Commissioner with

[7] See statement in H. Rep. No. 708, *supra*, pp. 32–33, set forth in Appendix B, *infra*.

reference to the prices at which similar articles were sold in the ordinary course of trade.[8] The special treatment made in such cases, particularly in the case of sales by the manufacturer at retail, gives sharp emphasis to the failure of Congress to make similar provisions for cases like the present, where none of the manufacturer's sales was at retail. The portions of the legislative history principally relied upon by the petitioner, and by the Circuit Court of Appeals for the Seventh Circuit in the *Campana* cases, *supra,* relate only to the special situation of sales by a manufacturer at retail,[9] and in no way detract from the frequent statements in the Congressional proceedings that the normal measure of the tax was to be the manufacturer's or wholesaler's selling price.[10]

The petitioner's argument on Section 619 (b) assumes that employment of a nominally distinct but controlled selling corporation would enable the manufacturer to obtain exclusion of the advertising and selling expenses attributable to the tax-

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[8] Like provision was made in Section 619 (b) with respect to sales on consignment, and in Section 622 with respect to articles used by the manufacturer or producer.

[9] The statements in question are one by Congressman Crisp, 75 Cong. Record, Part 5, pp. 5693–5694, and another in H. Rep. No. 708, *supra*, pp. 32–33, which require no more than to be set forth in full, as has been done in Appendix B, *infra*, to show their true meaning.

[10] See, e. g., H. Rep. No. 708, *supra*, p. 37, quoted *supra*, fn. 6; Statement of Senator Blaine, 75 Cong. Record, Part 10, p. 11383; Statement of Senator Walsh, 75 Cong. Record, Part 10, p. 11657.

able articles. It is urged, further, that in order to prevent discriminatory application of the tax, manufacturers who sell directly to the trade should also be allowed to exclude these expenses. The cases are in agreement, however, that Section 619 (b) prevents avoidance of the tax through use of a controlled selling corporation. *Campana Corp.* v. *Harrison, supra; Bourjois, Inc.* v. *McGowan, supra; Ayer Co.* v. *United States, supra; Inecto, Inc.* v. *Higgins, supra; Luzier's, Inc.* v. *Nee, supra.* In the *Campana* cases, *supra* the Circuit Court of Appeals sustained imposition of the tax on the prices actually received by the selling corporation, but held that advertising and selling expenses should be excluded. The decisions rested, not upon the nominally distinct character of the selling corporation, but upon the broad ground that advertising and selling expenses must be excluded from the manufacturer's selling price regardless of the employment of a separate selling corporation. That is the very question in issue in this case.

Exclusion of advertising and selling expenses incurred in the usual course of business as a manufacturer would introduce serious administrative difficulties. Section 619 provides generally for the calculation of the excise taxes imposed by Title IV of the Revenue Act of 1932. These include, in addition to the tax imposed on toilet articles by Section 603, taxes on furs, jewelry, automobiles, radios, mechanical refrigerators, sporting goods,

firearms, cameras, etc. (Sections 604 *et seq.*). If the petitioner's contention is correct, Section 619 (a) also permits exclusion of the advertising and selling expenses of manufacturers of all these taxable articles. Section 626 (Appendix A, *infra*) requires monthly returns and payment of the tax. Section 619 (c) (Appendix A, *infra*) requires that the tax be paid upon each payment received by the manufacturer under a lease, conditional sale, etc., of a taxable article. The difficulties of allocating advertising expenses under such provisions become clear upon consideration of the role of advertising in modern business. Much advertising is of an institutional nature, and the selling price of an advertised product normally reflects advertising and selling expenses incurred over a period of years. Particular manufacturers may make articles subject to different rates of tax, and also articles which are not subject to tax. Congress regarded ease and simplicity of administration as a prime requisite of the excise taxes enacted by the Revenue Act of 1932, and considered that the provisions of Section 619 met that requirement.[11] That Congressional purpose would be frustrated if the statute is to be construed as the petitioner contends.

Exclusion of the expenses here involved would be inconsistent with the basic principle of the selective excise tax adopted by Congress in the

[11] H. Rep. No. 708, *supra*, pp. 31, 33 (1939-1 Cum. Bull. (Part 2) 457, 479, 481).

Revenue Act of 1932. Congress, hard pressed as a result of the depression to find new sources of revenue to compensate for the drying up of the usual sources of revenue,[12] first considered a general manufacturer's excise tax, but finally turned to an excise tax on selected commodities in the belief that this would be the fairest feasible way of obtaining the needed revenue.[13] To allow ex-

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[12] H. Rep. No. 708, *supra*, pp. 1 *et seq.* (1939–1 Cum. Bull. (Part 2) 457 *et seq.*); S. Rep. No. 665, *supra*, pp. 1 *et seq.* (1939–1 Cum. Bull. (Part 2) 496 *et seq.*)

[13] After eight weeks of deliberation the Committee on Ways and Means reported a bill (H. R. 10236, 72d Cong., 1st Sess.) which imposed a general excise tax of two and one-fourth per cent upon the "sale price" of articles sold in the United States by manufacturers or producers thereof, with exemptions in favor of certain articles and manufacturers. (Secs. 601, 602, 606.) There was strong opposition to the breadth of the tax base (H. Rep. No. 708, *supra*, p. 9 (1939–1 Cum. Bull. (Part 2) 457, 463); Statement of Congressman Lovette, 75 Cong. Record, Part 5, p. 5795; Statement of Congressman Schafer, 75 Cong. Record, Part 6, p. 6377), but the general manufacturer's tax was justified by the Committee on the grounds that a tax on "luxuries" would not produce the needed revenues, however high might be the rate, and that a tax on selected industries would be discriminatory (H. Rep. No. 708, *supra*, p. 9). The general manufacturer's tax was eventually stricken from the Bill in the House by the adoption of a committee amendment (75 Cong. Record, Part 6, p. 6819), and there were adopted instead excise taxes on various particular articles, including toilet preparations (75 Cong. Record, Part 6, pp. 7034 *et seq.*). This action left the Bill without any provisions corresponding to those of Section 604 of the Bill (to which the statements referred to in footnote 9, *supra* and set forth at Appendix B, *infra*, pertained). Thereafter Congressman Crisp offered, and the House adopted, a committee amendment providing that where a manufacturer customarily sold

clusion of these expenses would mean that the greater the promotional expenses incident to the manufacture or production of a taxable article, the less would be the effective rate of tax thereon. It would work a plain discrimination between advertised and unadvertised products, for it would exclude from the tax base for the former articles, amounts attributable to expenses made for the very purpose and with the usual effect of increasing their commercial value. It is true that to refuse the manufacturer exclusion of the advertising and selling expenses in cases like the present will not completely eliminate discrimination of this kind. A seller or distributor of taxable articles who is not also a manufacturer or producer, but who purchases the articles from an independent manufacturer or producer, may add to the commercial value of the taxable articles by advertising them, and this increment in value will go untaxed. That this possibility of avoidance involves serious elements of discrimination may be doubted however, in view of the fact that it

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taxable articles both at wholesale and retail, the tax on articles sold at retail "shall be computed on the price for which like articles are sold by him at wholesale," and that in cases of sales not at arm's length the tax should be computed on the "fair market price of such article." (75 Cong. Record, Part 7, pp. 7242–7243.) As passed by the House the Bill contained no definition of this term.

The provisions of Section 619 of the statute as finally enacted were adopted as the result of recommendations by the Senate Committee on Finance. See H. Conference Rep. No. 1492, *supra*, Amendment No. 183, p. 22 (1939–1 Cum. Bull. (Part 2) 539, 548).

entails business disadvantages which have prevented many firms from abandoning their functions as manufacturers or producers.[14] Whatever element of discrimination there may be is, in any event, the inevitable result of an excise tax based on the selling price of the manufacturer or producer.

While the amendment to Section 3401 of the Internal Revenue Code (the successor of Section 603 of the Revenue Act of 1932) by Section 3 of the Revenue Act of 1939 has no direct application to this case,[15] some comment on that provision is

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[14] See statement submitted by counsel for the Toilet Goods Association, Hearings before the Committee on Ways and Means on Revenue Revision, 1939, 76th Cong., 1st Sess., pp. 204, 205—

"A manufacturer advertising and selling his own produce at 50 cents pays a 5-cent tax on an article. A concern which purchases the same article at a base cost of 20 cents and then brands, advertises, and sells the article, absorbs a tax of only 2 cents on the same article. The disparity is obvious.

"If the question be asked, why can't the first manufacturer change his method so as to purchase the manufactured article from others, the answer is obvious. In the first place, only by the first method of doing business can the manufacturer control the quality of his product. Secondly, the purchase of the product from others would require the manufacturer (under the new Food, Drug, and Cosmetic Act) to add additional labels to his package, one of which would have to state "Distributed by" or "manufactured by." The effect of such change in labeling upon an established consumer trade, if not certainly damaging, is at least too doubtful to warrant any established firm in risking a change of its established method of doing business."

[15] Section 3 (b) of the Revenue Act of 1939 limited the applicability of Section 3 (a) to sales of taxable products on and after June 30, 1939. While it appears (R. 24–27) that

required in view of the credence apparently given by the Circuit Court of Appeals for the Seventh Circuit in the *Campana* cases, *supra* (114 F. 2d 410; 135 F. 2d 336), to a contention that this amendment was a declaration by Congress that it had intended by the 1932 Act to permit these expenses to be excluded from the selling price.

Section 3 (b) of the 1939 amendment expressly declared that the amendments made by Section 3 (a) thereof should be effective only as to the period after the date of its enactment. The amendment cannot, therefore, be considered to have been declaratory of the meaning of even Section 3401 of the Internal Revenue Code. Moreover, Section 3 (a) itself expressly provided that the amendment relied upon by the taxpayer was made "nothwithstanding" the provisions of Section 3441 (a) (successor of Section 619 (a) of the Revenue Act of 1932). Unlike Section 3401, which applied only to toilet preparations, this latter section applied to numerous other excise taxes imposed by the Revenue Act of 1932.

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this case involves articles sold during the period from October 1, 1936, to and including June 30, 1939, it does not appear that any articles were sold on the last day of the period. In the absence of proof of this fact, the petitioner could not recover any amount under the 1939 amendment even if it did allow exclusion of expenses of the character here in question. *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361; *Burnet* v. *Houston*, 283 U. S. 223; cf. *Helvering* v. *Taylor*, 293 U. S. 507, 514. In any event, the question is not presented here, since it was not raised in the petition for certiorari. *Southport Co.* v. *Labor Board*, 315 U. S. 100.

The argument reduces itself to this: that an expressly prospective amendment of Section 3401 of the Internal Revenue Code, made "notwithstanding" Section 3441 (a), was a legislative declaration that the meaning of the latter section had always been the same as that of the former section in its amended form. The contention refutes itself. On the contrary, the 1939 amendment recognized that expenses of the character embraced therein could not be excluded under Section 3441 (a). Moreover, the amendment has been construed not to extend to expenses such as are involved here. As the Court of Claims held in *Ayer Co.* v. *United States, supra,* p. 289:

> it was not all advertising and selling expenses that were to be excluded under the Revenue Act of 1939; it was only the *wholesaler's* expenses of advertising and selling. Manufacturer's advertising and selling expenses are not mentioned. By implication they are to be included. This, we think, is a continuation of the policy behind the 1932 act. [Italics added.]

The 1939 amendment failed to achieve satisfactory results, and in Section 552 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, Congress substituted a retail excise tax for the manufacturer's excise tax on toilet preparations. The reasons assigned for the change were that under the earlier law "evasion is substantial and inequitable competitive situations are created." H. Rep. No. 1040, 77th Cong., 1st Sess., p. 33.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
ANDREW D. SHARPE,
Special Assistants to the Attorney General.

DECEMBER 1944.

APPENDIX A

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by

the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;

(2) sold on consignment; or

(3) sold (otherwise than through an arm's-length transaction) at less than the fair market price; the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

(c) In the case of (1) a lease, (2) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments, or (3) a conditional sale, there shall be paid upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment.

SEC. 626. RETURN AND PAYMENT OF MANUFACTURERS' TAXES.

(a) Every person liable for any tax imposed by this title other than taxes on importation (except tax under section 615, relating to tax on soft drinks) shall make monthly returns under oath in duplicate and pay the taxes imposed by this title to the collector for the district in which is located his principal place of business or, if he has no principal place of business in the United States, then to the collector at

Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid.

Internal Revenue Code:

SEC. 3401. TAX ON TOILET PREPARATIONS, ETC.

There shall be imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes. (26 U. S. C. Sec. 3401.)

Section 3441 of the Internal Revenue Code (26 U. S. C., Sec. 3441) is substantially the same as Section 619 of the Revenue Act of 1932.

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 3. TOILET PREPARATIONS TAX AMENDMENTS.

(a) Section 3401 of the Internal Revenue Code (relating to the tax on toilet

preparations) is amended by inserting at the end thereof the following new paragraphs:

* * * * *

"Notwithstanding section 3441 (a), in determining, for the purpose of this section, the price for which an article is sold, whether at arm's length or not, there shall be included any charge for coverings and containers of whatever nature, only if furnished by the actual manufacturer of the article, and any charge incident to placing the article in condition packed ready for shipment, only if performed by the actual manufacturer of the article, but there shall be excluded the amount of the tax imposed by this section, whether or not stated as a separate charge. Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

(b) The amendments made by subsection (a) shall be effective only with respect to sales made after the date of the enactment of this Act. (26 U. S. C., Sec. 3401.)

Treasury Regulations 46 (1932 ed.):

ART. 8. *Basis of tax on sales generally.*—The tax is imposed on each sale by the manufacturer of the articles enumerated in these regulations. The provisions of the Act quoted embody the rules for determin-

ing the sale price, which is the basis of the tax. In general, this should be the manufacturer's actual price at the factory or place of production. In determining the sale price, for tax purposes, there shall be included any charge incident to placing the article in condition packed ready for shipment. There shall be excluded (1) the amount of tax imposed by Title IV, whether or not billed as a separate item, and (2) (subject to the provisions of article 12) transportation, delivery, insurance, installation, or other charges (not required by the preceding sentence to be included).

* * * * *

ART. 12. *Exclusion of charges for transportation, delivery, etc.*—Charges for transportation, delivery, insurance, installation, and other charges which have no connection whatever with the manufacturing process or with placing the article in a finished condition packed and ready for shipment, are to be excluded in computing the tax. Any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory may be so excluded.

These additional charges may not be excluded in computing the tax unless the amount thereof and the fact that they represent fair charges are established by adequate records to the satisfaction of the Commissioner.

Cumulative Bulletins XII–I, p. 415:

SECTION 619.—SALE PRICE.

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REGULATIONS 46, ARTICLE 13: Discounts and adjustments. XII-23-6216 S. T. 678

EXPENSES AND COMMISSIONS.

Advice is requested whether a demonstrator's expenses and commissions may be deducted from the net sale price of merchandise in computing the tax due.

It is stated that when the manufacturer closes a sale with a department store and it requests a demonstrator it is necessary for the manufacturer to furnish one free of charge and pay expenses and a commission of 10 or 15 percent on all retail sales made during the demonstrator's stay at the store. The question is asked whether such expenses and commissions are deductible for tax purposes.

The tax imposed by section 619 of the Revenue Act of 1932 is upon the sale price of the manufacturer, producer, or importer. Salaries, commissions, etc., paid to employees are not deductible in computing the tax, since they constitute a part of the selling expense.

Consequently, where a manufacturer sells merchandise to a department store and furnishes the store with a demonstrator, paying all expenses, plus commissions, the expenses and commissions may not be deducted from the sale price of the merchandise.

APPENDIX B

H. Rep. No. 708, 72d Cong., 1st Sess., pp. 32–33, 1939–1 Cum. Bull. (Part 2) 457):

UNIFORM APPLICATION OF TAX

It is of utmost importance that the tax be imposed and administered uniformly and without discrimination. Each member of a competitive group must pay upon substantially the same basis as all his competitors, even though his sales methods may differ. Consequently, the bill requires that every effort be made to ascertain the manufacturers' or producers' price at the place of manufacture or production. In the case of those commodities which are ordinarily sold at wholesale, this price will be the price at which the manufacturer sells to the wholesaler, even though the particular sale is at retail. This price may be established with respect to any particular sale or class of sales, for example, by existing wholesale prices, or by a system of discounts from retail prices, or by a building up from cost of production, whichever method may be the most practical. On the other hand, many commodities are not sold at "wholesale"—such as articles sold on specification or on special order. In cases of this kind, the tax is imposed upon the price at which the article actually is sold by the manufacturer.

It is expected that the officials in charge of the administration of the tax will confer

with representatives of each particular industry and with groups of taxpayers confronted with similar problems, and reach an agreement with them as to the methods by which the amount of their tax liability is computed. A principle agreed on in this manner should be applied uniformly to each member of the industry or group, whether or not he participated in the conference. Severe and justified criticism may be expected whenever one manufacturer is permitted to pay a lesser tax than his competitor.

Here, again, the matter of exemptions presents itself. Whenever an exemption is granted with respect to any particular article, the competing article must also be granted an exemption. Thus, the list of exemptions expands. And notwithstanding, unfairness and discrimination will appear, by reason of changes in competitive conditions, or by reason of our failure to consider or appreciate fully existing competitive conditions.

75 Cong. Record, Part 5, pp. 5693–5694—

Mr. HARLAN. Does the manufacturer's price that is contemplated include salesmen's commissions? I ask that question for the reason that there is an association of manufacturers in this country who deal directly with the purchaser and not through brokers or wholesale agents. They feel that their commissions are larger than if the commodities are sold directly through the wholesalers. They are fearful that this tax will discriminate against them because if it is decided on the wholesale price they will be paying a higher tax than the manufacturer who deals through the wholesaler.

Mr. CRISP. The selling cost is not intended to be added. Now, we are considering things like that, and there will be other cases that will present themselves. Some committee amendments may be necessary.

There is a provision in the bill giving the Treasury Department authority to enter into agreements with people of that kind and others as to what is a fair manufacturer's wholesale price. That agreement can not be changed, but it shall run during all of the period so that the man manufacturing will know what his tax is. The tax is to be levied on the wholesale manufacturer's price, and if he is selling to these agents he and the Treasury Department will agree as to what is a fair manufacturer's price.

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